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1-1-1983

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15 Pac. L.J. 1

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# The New California Exemptions in Bankruptcy: A Constitutional Reprise

BY GARY NEUSTADER\*

California's new law on the enforcement of judgments, effective July 1, 1983, included significant changes in the type and amount of property that a judgment debtor or a judgment debtor and spouse may exempt from enforcement of a money judgment.<sup>1</sup> These changes in exemption law are vitally important to the attorney who offers insolvency counseling because the Bankruptcy Code permits, and many states require, that a debtor in a bankruptcy proceeding rely on state exemption law to exempt property from the reach of the bankruptcy trustee.<sup>2</sup>

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\* Associate Professor of Law, University of Santa Clara. The author wishes to acknowledge the assistance of Jacquie Ellenberger in the preparation of this article.

1. CAL. CIV. PROC. CODE §§680.010-724.260 (Enforcement of Judgments Law). The Enforcement of Judgments Law replaces the existing Title 9 of the California Code of Civil Procedure with a new Title 9. The law was engineered by the California Law Revision Commission. See CAL. L. REV. COMM'N, *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 CAL. L. REV. CCOM'N REPORTS 2001 (1980). The Commission, in cooperation with California Continuing Education of the Bar, has published a convenient and thorough reference source which includes the full text of the law, a Summary of the Commission's Recommendation, the full text of the Commission's Recommendation, and official comments to the text of each section of the statute. CAL. L. REV. COMM'N, *1982 Creditors' Remedies Legislation*, 16 CAL. L. REV. COMM'N REPORTS 1001 (1982). [hereinafter referred to as *Creditors' Remedies Legislation*]. The exemption provisions are located in Chapter 4 of Division 2 of the new Title 9, beginning with section 703.010 of the Code of Civil Procedure. That chapter commences with an article of general provisions, and continues with articles describing the procedure for claiming an exemption from execution, the type and amount of personal property which may be exempted, and the exemption of property used as a principal dwelling. Then follows a separate chapter governing wage garnishment. *Id.*

2. 11 U.S.C. §522(b) (Supp. V 1981). A choice of state exemptions will also determine the extent to which a debtor may avoid the fixing of certain liens which impair an exemption to which

The new California exemption law may preserve to debtors in bankruptcy the existing option of electing the exemptions listed in section 522(d) of the Bankruptcy Code—the “federal bankruptcy exemptions”.<sup>3</sup> Moreover, the new exemption law will not alter the practical rule of thumb that the California debtor with significant equity in property used as a principal dwelling should usually choose the California exemptions, while the debtor who rents living accommodations should usually choose the federal bankruptcy exemptions.<sup>4</sup> The new exemption provisions, however, affect pre-petition insolvency counseling and planning for individuals in significant ways.

This article will address only those exemption provisions in the new law that raise significant constitutional issues: a provision prohibiting exemption stacking; a provision that possibly precludes the choice of federal bankruptcy exemptions; and a provision applying the new exemptions retroactively. This author leaves to a later day, or to others, comment on additional changes in the new exemption law having important implications for insolvency counseling of individuals.<sup>5</sup>

#### EXEMPTION STACKING AND OPT OUT

One of the most significant questions generated by section 522 of the Bankruptcy Code has been whether a husband and wife can split their

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the debtor would otherwise be entitled. *Id.* §522(f) (Supp. V 1981). A claim of state exemptions will also fix the statutory minimum of property to be distributed on account of allowed unsecured claims in a Chapter 13 plan. *Id.* §1325(a) (4) (Supp. V 1981). That minimum can be determined only by knowing the value of the debtor's estate which could be liquidated under Chapter 7, which in turn can only be known after ascertaining the property which the debtor could exempt in a Chapter 7 proceeding. Section 522(b) of the Bankruptcy Code actually permits the debtor to exempt property which is exempt under state or local law *and* property which is exempt under non-bankruptcy federal law. *Id.* §522(b) (Supp. V 1981). For convenience, the author sometimes use the phrases “state exemptions” or “state exemption law” as a convention to refer to both in the context of section 522(b).

3. A debtor may not select the federal bankruptcy exemptions listed in section 522(d) of the Bankruptcy Code if the state in which the debtor has filed a petition has opted out of those exemptions by appropriate legislation. 11 U.S.C. §522(b) (Supp. V 1981). Whether California has opted out is the subject of ensuing discussion in the text.

4. California law continues to protect a maximum of \$45,000 equity in property used as a principal dwelling. CAL. CIV. PROC. CODE §704.730. The federal bankruptcy exemptions protect a maximum of \$7,900 equity for an individual judgment debtor or \$15,800 equity for married judgment debtors. 11 U.S.C. §§522(d)(1), (5), 522(m) (Supp. V 1981). For those who rent, the \$7,900 or \$15,800 may be applied to any property whatsoever, in addition to property exempt under other subsections of section 522(d). For a further discussion of the rule of thumb, see generally Neustadter, *Consumer Insolvency Counseling for Californians in the 1980's*, 19 SANTA CLARA L. REV. 817, 856-63 (1979). [hereinafter referred to as Neustadter].

5. See CAL. CIV. PROC. CODE §704.020 (an alteration of the household furnishings exemption to preclude reliance upon the debtor's station-in-life); *Id.* §704.070 (substitution of a paid earnings deposit account exemption for the exemption of funds in a savings and loan association or credit union); *Id.* §§704.100, 704.110 (alteration of exemptions for life insurance policies, loan values, and benefits, and for private retirement benefits); *Id.* §§704.140, 704.150 (new exemptions for damages for personal injury or wrongful death); and *Id.* §704.730(b) (a \$45,000 limit to the homestead exemption regardless of whether the homestead consists of community property or separate property or both).

choice of exemptions in a joint case.<sup>6</sup> Specifically, the question is whether one spouse in a joint case may choose the exemptions allowed under state and nonbankruptcy federal law to protect some property, while the other spouse chooses the federal bankruptcy exemptions to protect more of the same property or other kinds of property.<sup>7</sup> This practice, sometimes referred to as "exemption stacking," has been sustained in recent bankruptcy cases on the basis of section 522(m). The section provides that ". . . section 522 shall apply separately with respect to each debtor in a joint case."<sup>8</sup>

Exemption stacking is, of course, not possible in the many states that have opted out of the federal bankruptcy exemptions.<sup>9</sup> Moreover, the possibility of exemption stacking in states that have not opted out may be eliminated by Congress. Congress has proposed to eliminate federal bankruptcy exemptions entirely and to permit debtors to exempt only property protected under state law or nonbankruptcy federal law from enforcement of a money judgment. This proposal essentially would revert to the exemption law policy of the Bankruptcy Act.<sup>10</sup> In other

6. A joint case is authorized by section 302 of the Bankruptcy Code. 11 U.S.C. §302 (Supp. V 1981).

7. To illustrate, suppose that husband and wife living in California file a joint petition under Chapter 7. They hold, as community property, real property used by them as their principal residence. The real property is valued at approximately \$150,000, but the property is encumbered by deeds of trust securing notes in the total amount of \$100,000. Accordingly, the debtor's equity in the real property is approximately \$50,000. Were both debtors to choose the California exemptions, they would be able to protect a maximum of \$45,000 of equity in their home (issues of retroactivity aside). CAL. CIV. PROC. CODE §704.730. Were both to choose the federal bankruptcy exemptions, they would be able to protect a maximum of \$15,800 of equity in their home (each claiming \$7,900 exempt under subsections 522(d)(1), (5)). In either case, absent a negotiated settlement with the trustee, the debtors would face the prospect of losing their home through forced sale, subject to their receiving the amount of the exemption from the proceeds of the sale. To avoid that possibility, one spouse could claim the California exemptions (protecting \$45,000 in equity) and the other spouse could claim (and thus "stack") the federal bankruptcy exemptions (including \$7,900 in any property), thus protecting the remaining \$5,000 in equity. This practice has been sanctioned by Bankruptcy Appellate Panels in the Ninth Circuit. *In re Emmerich*, 19 Bankr. 666, 667 (Bankr. 9th Cir. 1982); *In re Ageton*, 14 Bankr. 833, 837 (Bankr. 9th Cir. 1981). The decisions from the Ninth Circuit Bankruptcy Appellate Panels preceded, and hence did not consider, the exemption stacking prohibition discussed later in the text. Comment, *The Bankruptcy Reform Act of 1979: An Exemption Windfall for Joint Debtors?*, 18 CAL. W. L. REV. 80, 95-96 (1982) (per a discussion of conflicting decisions which preceded the decisions of the Ninth Circuit Bankruptcy Appellate Panels). The author has argued previously that this practice abuses the spirit of both the California exemptions and the federal bankruptcy exemptions because the protection in California for real property used as a principal residence is intended to provide protection to a family unit. See CAL. CIV. PROC. CODE §§704.730(a)(2)(B), 704.710(b). To allow one spouse in that unit to claim California's exemption for the principal residence and to allow the other spouse in that unit to "stack" additional protection from section 522(d) on top of the state exemption is clearly giving to the debtors more than either the California Legislature or the Congress ever contemplated. Neustadter, *supra* note 4, at 865-66. Nonetheless, courts have sustained the practice on the basis of the allegedly plain meaning of the language in section 522(m) of the Bankruptcy Code. 11 U.S.C. §522(m) (Supp. V 1981).

8. 11 U.S.C. §522(m) (Supp. V 1981). See *supra* note 7.

9. To date 35 states have opted out. See 3 COLLIER ON BANKRUPTCY, §522.02, n.4a at 522-31 (15th Ed. 1983).

10. H.R. 4786, 97th Cong., 1st Sess. §8 (1981).

bills, Congress simply has proposed to amend section 522(m) to require that both spouses in a joint case elect the same set of exemptions.<sup>11</sup> If Congress, however, fails to amend the Bankruptcy Code in these or comparable ways, the issue posed by exemption stacking will command attention for some time.

The issue is unresolved in California because provisions of the Code of Civil Procedure purport to eliminate exemption stacking as a matter of state law. In 1981, the California Legislature enacted Assembly Bill 1857, which amending section 6980 of the Code of Civil Procedure to prohibit exemption stacking.<sup>12</sup> This provision was quickly declared unconstitutional by judges in California bankruptcy courts on the ground that it conflicted with section 522(m) of the Bankruptcy Code and thereby violated the Supremacy Clause of the United States Constitution.<sup>13</sup> Those judicial decisions have not ended the matter, however, because the prohibition is renewed in the new Enforcement of Judgments Law.

New section 703.130 of the Code of Civil Procedure also prohibits exemption stacking.<sup>14</sup> Subdivision (a) of section 703.130 flatly states

11. H.R. 1147, 98th Cong., 1st Sess. §5 (1983); S. 445, 98th Cong., 1st Sess. §208(a) (1), (2) (1983); S. 333, 98th Cong., 1st Sess. §5 (1983); H.R. 7349, 97th Cong., 2nd Sess. §304(c) (1983); S. 2000, 97th Cong., 2nd Sess. §8(a)(1), (2) (1983); S. 992, 97th Cong., 1st Sess. §1 (1981).

12. The amendment redesignated former subsection (b) as subsection (c) and added a new subsection (b) reading as follows:

(b) Pursuant to the authority of paragraph (1) of subsection (b) of Section 522 of Title 11 of the United States Code, the exemptions set forth in subsection (d) of Section 522 of Title 11 of the United States Code are authorized in this state as follows:

(1) When a husband and wife are joined in a petition filed under Title 11 of the United States Code, they jointly may elect to utilize the applicable exemption provisions under this chapter or under subsection (b) of section 522 of Title 11 of the United States Code, but not both.

(2) When a petition under Title 11 of the United States Code is filed individually, and not jointly, for a husband or a wife, one spouse shall not claim any exemption under this chapter if the other spouse has claimed any exemption under subsection (b) of section 522 of Title 11 of the United States Code, and one spouse shall not claim any exemption under Title 11 of the United States Code if the other spouse claimed any exemption under this chapter.

CAL. CIV. PROC. CODE §690(b) (repealed as of July 1, 1983).

13. *In re Stacey*, 24 Bankr. 97, 98-99 (Bankr. S.D. Cal. 1982); *In re Lee*, 22 Bankr. 977, 979 (Bankr. C.D. Cal. 1982); *In re Hopkins* unreported (Bankr. N.D. Cal. 1982) (order on file with author).

14. The section reads as follows:

(a) Pursuant to the authority of paragraph (1) of subsection (b) of Section 522 of Title 11 of the United States Code, the exemptions set forth in subsection (d) of Section 522 of Title 11 of the United States Code (Bankruptcy) are not authorized in this state.

(b) Notwithstanding subdivision (a), if a husband and wife are joined in a petition filed under Title 11 of the United States Code (Bankruptcy), they jointly may elect to utilize the applicable exemption provisions under this chapter or to utilize the applicable exemptions set forth in subsection (d) of Section 522 of Title 11 of the United States Code, but not both.

(c) Notwithstanding subdivision (a), if a petition under Title 11 of the United States Code (Bankruptcy) is filed individually, and not jointly, for a husband or a wife, the exemptions set forth in subsection (d) of Section 522 of Title 11 of the United States Code are authorized in this state if the husband and wife each effectively waive in writ-

that California opts out of the federal bankruptcy exemptions, thus exercising the opt out authority granted under section 522(b) of the Bankruptcy Code. The remaining subdivisions of section 703.130 then return to debtors almost all of what subdivision (a) appears to have taken from them. Subdivision (b) allows spouses in a joint case to exercise either the California exemptions or the federal bankruptcy exemptions if, and only if, each spouse chooses the same set of exemptions. Subdivision (c) allows a husband *or* wife in any bankruptcy case commenced by *one* of them to choose the federal bankruptcy exemptions on condition that the nonpetitioning spouse executes a written waiver of his or her right to claim the California exemptions in a case filed while the case of the previously petitioning spouse is still pending. Subdivision (d) permits an unmarried person to choose the federal bankruptcy exemptions.

Thus, although written and structured differently than its progenitor, section 690(b) of the Code of Civil Procedure, the net effect of section 703.130 is only to prohibit exemption stacking, not to opt out of the federal bankruptcy exemptions. The staff of the California Law Revision Commission, drafters of the section, believed that the revised form in which the prohibition on exemption stacking was drafted would likely be held constitutional,<sup>15</sup> but decisions concerning section 690(b) now make this view appear to have been unduly optimistic. Because the substance, though not the form, of section 703.130 is identical to the

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ing the right to claim, during the period the case commenced by; filing such petition is pending, the exemptions provided by the applicable exemption provisions of this chapter in any case by filing a petition for either of them under Title 11 of the United States Code.

(d) Notwithstanding subdivision (a), if a petition is filed under Title 11 of the United States Code (Bankruptcy) for an unmarried person, the unmarried person may elect to utilize the applicable exemption provisions under this chapter or to utilize the applicable exemptions set forth in subsections (d) of Section 522 of Title 11 of the United States Code, but not both."

CAL. CIV. PROC. CODE §703.130.

15. The staff of the California Law Revision Commission first proposed section 703.130 in its First Supplement to Memorandum 81-91, dated October 8, 1981, (copy on file with author or available from the Commission), in response to the chaptering of Assembly Bill 1857 in September, 1981. 1981 Cal. Legis. Serv. Chap. 455. After 1857 was chaptered, the Commission decided to continue the substance of 1857 in the new, comprehensive enforcement of judgments law rather than to abandon the prohibition on exemption stacking. The staff recognized that "if subdivisions (b) and (c) were held unconstitutional, subdivision (a) would preclude the claiming of the federal exemptions, but the staff's view was that it was much more likely that a court would uphold the entire section—including subdivisions (b) and (c)—as a reasonable solution to a difficult problem." Letter from John H. DeMouly, Executive Secretary of the Commission, to the author (April 6, 1983). Presumably the reasoning supporting this view is roughly as follows: Congress permitted states to opt out of the federal bankruptcy exemptions in favor of state created exemptions; because section 703.130(a) opts out, the state is free to create whatever exemptions it wishes for debtors who petition for relief under the Bankruptcy Code, including a scheme which prohibits exemption stacking. This reasoning seems flawed because it fails to consider the conflict between such a prohibition and the language of section 522(m) of the Bankruptcy Code.

substance of section 690(b), this new prohibition on exemption stacking likely suffers the same constitutional infirmity.

Nonetheless, subdivision (a) of section 703.130 might well survive the constitutional attack because of the power of the courts to sever the unconstitutional portions of a statute.<sup>16</sup> Subdivision (a) certainly could stand alone grammatically.<sup>17</sup> Were subdivisions (b), (c) and (d) to be severed from section 703.130, subdivision (a) would then express a determination by the California Legislature to opt out of the federal bankruptcy exemptions. Indeed, the legislative committee comment to section 703.130 asserts that subdivisions (b), (c) and (d) are severable from subdivision (a).<sup>18</sup> The courts are inclined to look to the intent of the legislature in enacting a statute when deciding whether severance is appropriate,<sup>19</sup> and the legislative committee comment is a weighty indication of legislative intent.<sup>20</sup>

Nevertheless, severance could possibly be held improper and the entire section ruled unconstitutional. This possibility rests upon conflicting messages indicating the intent of the legislature. In March, 1981, Assemblyman Lancaster introduced Assembly Bill 1857.<sup>21</sup> The original bill provided for California to opt out of the federal bankruptcy exemptions. Because the bill was introduced for the purpose of prohibiting exemption stacking,<sup>22</sup> however, Assembly Bill 1857 was amended in the Assembly to substitute a prohibition on exemption stacking for the opt out provision. The amended bill was enacted but, as previously noted, its provisions were later declared unconstitutional.<sup>23</sup>

It is illogical to conclude that the legislature intended to resurrect the opt out proposal of the original Assembly Bill 1857 by enacting section

16. CAL. CIV. PROC. CODE §681.050. Section 681.050 of the Code of Civil Procedure, added by the new law, authorizes severance. It recites the standard litany that invalid provisions shall not affect other provisions which can be given effect without the invalid provision. *Id.*

17. [I]n considering the issue of severability, it must be recognized that the general presumption of constitutionality, fortified by the express statement of a severability clause, normally calls for sustaining any valid portion of a statute unconstitutional in part. *This is possible and proper where the language of the statute is mechanically severable, that is, where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words.* (emphasis added). *In re Blaney*, 30 Cal. 2d 643, 655, 184 P.2d 892, 900 (1947).

18. "Subdivision (b), (c) and (d) of Section 703.130 are severable from subdivision (a), and the invalidity of any or all of these subdivisions does not affect the rule stated in subdivision (a). See Section 681.050." CAL. CIV. PROC. CODE §703.030 (Legis. Comm. Comment-Assembly).

19. *See, e.g., People v. Navarro*, 7 Cal. 3d 248, 261, 102 Cal. Rptr. 137, 145-46 (1974).

20. *See Comment, The Use of Extrinsic Aids in Determining Legislative Intent in California: The Need for Standardized Criteria*, 12 PAC. L.J. 189, 202, 204 (1980).

21. The bill emanated from the California Bankers' Association and was supported by the California Association of Collectors, the California Credit Union League, the California Savings and Loan League, and the California Retailers Association. (legislative history is on file with author).

22. Legislative history on file with author.

23. *See cases cited supra* note 13.

703.130 when the ostensible purpose of this section was simply to re-draft the exemption stacking prohibition in a way that likely would be held constitutional.<sup>24</sup> Of course, the same legislature that rejected an opt out provision in 1981 could favor the provision in the following year.<sup>25</sup> A more reasonable assumption, however, is that most legislators did not notice the opt out issue since it was buried in a bill of massive length and complexity, obscured by the more notable goals and provisions of the bill.<sup>26</sup> The possibility of opt out, likely did not receive meaningful consideration on the merits.

In addition, the section 703.130 itself implicitly reflects an intention that residents of California be permitted to choose the federal bankruptcy exemptions. Subdivision (b) provides that spouses may jointly elect the federal exemptions; subdivision (c) states that one spouse may elect the federal exemptions if the other spouse waives the right to claim the California exemptions in a petition subsequently filed; and subdivision (d) provides that all unmarried persons may elect the federal bankruptcy exemptions. A more ringing endorsement of the option to choose the federal bankruptcy exemptions can hardly be imagined. The conundrum, of course, is that subdivision (a) states just the opposite.

The seemingly inconsistent messages of section 703.130 can be explained by the view of the Law Revision Commission staff that the format of section 703.130 was the best way to circumvent the constitutional problem.<sup>27</sup> Alternatively, the drafting of the section can be understood by concluding that the legislature desired to opt out of the federal bankruptcy exemptions if the more modest goal of prohibiting exemption stacking could not constitutionally be achieved. This conclusion assumes, however, that the legislature was willing to “throw out the baby with the bath water,” because the abuses stemming from exemption stacking are minimal compared to the benefits enjoyed by a significant portion of California residents by virtue of the federal bankruptcy exemptions.

Most notably, sections 522(d)(1) and 522(d)(5) of the Bankruptcy

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24. See *supra* note 15 and accompanying text.

25. 1981 and 1983 were in the same legislative session and bills introduced in each year were thus considered by the same legislators.

26. The Enforcement of Judgments Law consists of almost 500 separate sections and consumes 267 pages in the Code of Civil Procedure. The new law was intended to “provide a full and clear statutory treatment of the law governing enforcement of judgments.” CAL. L. REV. COMM’N, *Creditors’ Remedies Legislation*, *supra* note 1, at 1029. It would be surprising if more than a handful of legislators were aware of the issues posed by section 703.130. Only the *cognoscente* would recognize the possibility that a comprehensive law affecting enforcement of judgments in the state remedies system might conceal a blockbuster provision affecting the rights of debtors in a bankruptcy proceeding.

27. See *supra* note 15 and accompanying text.



Code provide renters with a measure of parity with homeowners. Those federal bankruptcy exemptions permit a debtor to exempt \$7,900 in value of any property to the extent not claimed for a homestead or burial plot. No comparable exemption exists under California law, but California law does afford a generous homestead exemption. Thus, an opt out of the federal bankruptcy exemptions will renew the discrimination against renters that inheres in the California exemption provisions. This result would be inconsistent with other action taken by the California Legislature to respond of the needs of renters.<sup>28</sup>

Given these conflicting messages concerning legislative intent, a court may justifiably conclude that subdivision (a) of section 703.130 cannot stand severed from its unconstitutional companions. This holding would return the issue to the legislature where it could be raised and clearly considered on the merits. Notably, the legislature and the financial institutions which might support opt out could consider recent studies concluding that the availability of federal bankruptcy exemptions does not increase the rate of consumer bankruptcy filings.<sup>29</sup>

In the event that a court decides that severance is appropriate, notwithstanding the arguments just advanced, section 703.130(a), standing alone, may still be unconstitutional. Bankruptcy judges elsewhere have held opt out legislation to be unconstitutional.<sup>30</sup> The constitutional argument advanced in these cases, detailed more fully elsewhere,<sup>31</sup> is based upon the premise that the opt out authority is a congressional delegation of federal power that may be exercised only within defined limits. The limits implicit in the Bankruptcy Code require that exemptions provide debtors with a fresh start. If a state's exemption law fails to afford residents of the state a fresh start analogous to that afforded by the federal bankruptcy exemptions, opt out legislation in that state is arguably unconstitutional because it fails to exercise the delegated authority in the manner circumscribed by Congress. This argument may be directed at subdivision (a) of section 703.130 because the California exemptions fail to afford nonhomeown-

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28. See e.g., CAL. CIV. CODE §1950.5 (renters' rights concerning security for a rental agreement); CAL. REV. & TAX CODE §17053.5 (tax credit for qualifying renters); CAL. HEALTH & SAFETY CODE §§50735-50770 (rental housing construction program).

29. Woodward and Woodward, *Exemptions As An Incentive to Voluntary Bankruptcy: An Empirical Study*, 57 AM. BANKR. L. J. 53, 64 (Winter 1983); Woodward, *Exemptions, Opting Out, and Bankruptcy Reform*, 43 OHIO ST. L. J. 335, 360-63 (1982).

30. *In re Balgemann*, 16 Bankr. 780, 783 (Bankr. N.D. Ill. 1982); *In re Rhodes*, 14 Bankr. 629, 634-36 (Bankr. M.D. Tenn. 1981). Compare with *In re Sullivan*, 680 F.2d 1131, 1132-35 (7th Cir. 1983). *Id.*

31. Woodward, *Exemptions, Opting Out, and Bankruptcy Reform*, 43 OHIO ST. L.J. 335, 373-74 (1982); Comment, *Bankruptcy Exemptions: Whether Illinois's Use of the Federal "Opt Out" Provision Is Constitutional*, 1981 S. ILL. U. L.J. 65, 70-71 (1981).

ers a fresh start analogous to that given to them by the federal bankruptcy exemptions.

Section 703.130 also raises important implications that present difficulties for the counseling of clients. The attorney advising an unmarried client may safely conclude that the federal bankruptcy exemptions are available to exempt property from the client's estate unless and until a bankruptcy court rules that only subdivision (a) is constitutional. The attorney counseling the married couple whose property may be entirely exempted without the benefit of exemption stacking, through a joint election of either the California exemptions or the federal bankruptcy exemptions, may reach the same conclusion. However, when the property of a married couple may not entirely be exempted without the benefit of exemption stacking, the clients must be advised that if they stack exemptions, they risk a ruling that will deny them the benefits of the federal bankruptcy exemptions. The couple may be denied benefits either because section 703.130 is constitutional, thus prohibiting stacking, or because only subdivision (a) of section 703.130 is constitutional, thus opting out of the federal bankruptcy exemptions. If the entire section is unconstitutional, the exemption stacking will succeed. One hopes that the clients who are offered as sacrifice for a decision on this issue will have been adequately informed of the risks, and that a decision to end the uncertainty soon will be forthcoming.

#### RETROACTIVE APPLICATION OF EXEMPTIONS

The assault on section 703.130 is not the only constitutional battle invited by the new California exemption provisions are also subject to another constitutional attack.<sup>32</sup> Section 703.050 applies the new exemption provisions to judgments based on tort, contract or other legal theory, whether those claims arose prior to or after July 1, 1983.<sup>33</sup> Section 703.060 reserves the right of the legislature to make retroactive changes in the future.<sup>34</sup> In the bankruptcy context, when a debtor

32. CAL. CIV. PROC. CODE §§703.050, 703.060.

33. The statement in the text is an over simplification. Section 703.050(a) provides that the determination whether property is exempt, or the amount of the exemption, shall be made by applying the exemption statutes in effect at the earliest time the judgment creditor obtains a lien on the property in question. Thus, for example, if a judgment creditor has levied a writ of execution on property prior to July 1, 1983, the property will be exempt to the extent provided in exemption statutes in effect on the date of the levy (assuming no prior lien) because that is when an execution lien is created. *Id.* §703.050. This raises a further problem which is not pursued in the text. Suppose a creditor obtained a lien but the lien is later avoided in bankruptcy as a preference. May the creditor who obtained the lien which has been avoided nonetheless claim that exemptions in effect at the time the lien was obtained are to be applied in a bankruptcy proceeding commenced after the date of a change in the exemption law?

34. Section 703.060 is worthy of reproduction here in its entirety:

(a) The legislature finds and declares that generally persons who enter into contracts do not do so in reliance on an assumption that the exemptions in effect at the time of the

chooses to exercise the California exemptions, these sections would appear to allow the debtor to exempt property in accordance with the California exemption law in effect on the day of the filing of the petition, notwithstanding the existence of contract creditors who extended credit prior to the effective date of a change in the exemption law. The constitutional problem attending such a result has been discussed elsewhere,<sup>35</sup> but it appears useful to sketch and supplement that discussion in preparation for the forthcoming attack on these sections.

Since the decision of the United States Supreme Court in *Edwards v. Kearzey*,<sup>36</sup> retroactive application of changes in exemption laws as applied to unsecured contract creditors has tripped on the Contract Clause of the U.S. Constitution.<sup>37</sup> The Edwards Court, in an execution context, the Court held that action taken by North Carolina in 1868, increasing the amount of the homestead exemption from \$500 to \$1000, could not constitutionally be applied to a contract creditor who extended credit prior to the enactment of the statute because the statute would thereby impair the creditor's contract rights. Notably, the court commented that material or substantial impairments were condemned,<sup>38</sup> thus leaving open the possibility that less drastic changes in an exemption statute might not impair the obligation of contract.

More than 100 years later, in *Allied Structural Steel Co. v. Spannaus*,<sup>39</sup> the United States Supreme Court reviewed its decisions under the

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contract will govern enforcement of any judgment based on the contract, that liens imposed on property are imposed not as a matter of right but as a matter of privilege granted by statute for purposes of priority, that no vested rights with respect to exemptions are created by the making of a contract or imposition of a lien, that application of exemptions and exemption procedures in effect at the time of enforcement of a judgment is essential to the proper balance between the rights of judgment debtors and judgment creditors and has a minimal effect on the economic stability essential for the maintenance of private and public faith in commercial matters, and that it is the policy of the state to treat all judgment debtors equally with respect to exemptions and exemption procedures in effect at the time of enforcement of a money judgment. To this end, the Legislature reserves the right to repeal, alter, or add to the exemptions and the procedures therefor at any time and intends, unless otherwise provided by statute, that any repeals, alterations, or additions apply upon their operative date to enforcement of all money judgments, whether based upon tort, contract, or other legal theory or cause of action that arose before or after the operative date of the repeals, alterations, or additions, whether the judgment was entered before or after the operative date of the repeals, alterations, or additions.

(b) All contracts shall be deemed to have been made and all liens on property shall be deemed to have been created in recognition of the power of the state to repeal, alter, and add to statutes providing for liens and exemptions from the enforcement of money judgments.

CAL. CIV. PROC. CODE §703.060.

35. See, e.g., Comment, *The Contract Clause and the Constitutionality of Retroactive Application of Exemption Statutes: A Reconsideration*, 9 PAC. L.J. 889 (1978).

36. *Edwards v. Kearzey*, 96 U.S. 595 (1877).

37. U.S. CONST., art. I, §10, cl. 1 ("No State shall . . . make any . . . Law impairing the Obligation of Contracts. . . .").

38. *Edwards*, 96 U.S. at 601, 603 (1877).

39. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

contract clause and held a Minnesota law imposing new pension funding charges unconstitutional as an impairment of a pre-existing contract between an employer and its employees. In language reminiscent of the concern for substantiality expressed in *Edwards*, the court stated:

. . . the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.<sup>40</sup>

Later, the court explained that the inquiry into the nature and purpose of state legislation when the impairment is substantial may lead to the conclusion that the legislation is nonetheless constitutional if the legislation is addressed to a broad, generalized economic or social problem in an area already subject to state regulation.<sup>41</sup>

Neither of these cases, nor any other United States Supreme Court decision, has considered whether retroactive application of changes in state exemption law to unsecured contract creditors in a *bankruptcy proceeding* runs afoul of the Contract Clause.<sup>42</sup> An obvious but apparently novel proposition is therefore advanced by this author: in the bankruptcy exemption context the Contract Clause is simply irrelevant, even when the debtor chooses to exempt property that is exempt under state or local law because the exemptions afforded debtors in proceedings under the Bankruptcy Code are exemptions granted by *federal* law. Only the impairment of contract by *state* law is prohibited by the Contract Clause.<sup>43</sup>

It is true, of course, that section 522 of the Bankruptcy Code refers to state or local law in describing the exemptions that a debtor may choose.<sup>44</sup> This choice, however, is authorized by federal law and is not tantamount to an impairment of the obligations of contract by state law. There is a difference between the retroactive application of

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40. *Id.* at 244-45.

41. *Id.* at 250. The court here also suggests that the statute which substantially impairs contractual obligations may be constitutional only if the impairment is temporary. *Id.*

42. *Edwards*, and *W. B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934), come the closest by considering retroactive application in the context of a state law preceeding for enforcement of a money judgment. The other cases collected in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), are further from the mark.

43. "The bankruptcy power, like the other substantive powers of Congress, is subject to the Fifth Amendment. Under the bankruptcy power Congress may discharge the debtor's personal obligation, because, unlike the States, it is not prohibited from impairing the obligation of contracts. . . ." *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589-90 (1935). In the *Radford* case the Supreme Court found the retroactive impairment of *lien* rights in bankruptcy to be unconstitutional under the Fifth Amendment Due Process Clause.

44. 11 U.S.C. §522(b)(2)(A) (Supp. V 1981).

changes in exemption law in the context of a state law proceeding for the enforcement of a judgment, and the retroactive application of changes in exemption law in the context of a bankruptcy proceeding. In the former, a problem of impairment of contract by state law truly does exist. In the latter, the impairment arises solely by virtue of the congressional exercise of the bankruptcy power. Retroactive application of exemptions in bankruptcy should no more be subject to the Contract Clause than are the provisions affording the debtor a discharge from debt.<sup>45</sup>

A harmonious reading of the language in section 522(b) of the Bankruptcy Code supports this conclusion. Section 522(b)(2)(A) allows a debtor to choose property that is exempt under state or local law *and* under nonbankruptcy federal law applicable on the date of the filing of the petition.<sup>46</sup> There is good reason to support the view that "applicable" state or local law should not be taken to include state law concerning the retroactive application of exemptions in the context of a proceeding to enforce a judgment. Nonbankruptcy federal exemptions that a debtor may choose in a bankruptcy proceeding are clearly not subject to the constraints of the Contract Clause because these exemptions are not state law. Similarly, the federal bankruptcy exemptions that debtors in some states may choose are not subject to the constraints of the Contract Clause because those exemptions are federal law. It would be anomalous to conclude that the state or local law exemptions that a debtor might choose could not be applied retroactively, but that the nonbankruptcy federal exemptions or the federal bankruptcy exemptions available to the same debtor may be applied retroactively. A more reasonable interpretation is that the language in section 522(b) reserves to the debtor the kinds and amounts of property that section 522(d), nonbankruptcy federal law, or state or local law identify as exempt as of the date of the filing of the petition. This interpretation is consistent with the principle that exemptions under state or local law might not be retroactively applicable to contract creditors in the context of an enforcement of judgment.

Opinions in bankruptcy cases have failed to discuss the proposition advanced by this author. Rather, courts have assumed without question that the Contract Clause was implicated in the bankruptcy decision because the Contract Clause is applicable to an analogous issue in

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45. *Id.* §§737, 524 (Supp. V 1981). Exemptions and discharge are the complementary principles of bankruptcy law essential to the goal of a fresh start for the debtor. *Id.*

46. 11 U.S.C. §522(b)(2)(A) (Supp. V 1981). The exemption of certain deposits by members of the armed forces is an example of a non-bankruptcy federal exemption. 10 U.S.C. §1035(d) (1976).

the context of a state law proceeding for enforcement of a judgment. That assumption seems unwarranted and should be challenged.

If the challenge fails, nevertheless there is still promise for debtors in bankruptcy that changes in the exemption law may be applied retroactively. Here too, however, the debtor must fight upstream, burdened by the assumption questioned above that the Contract Clause applies in the bankruptcy context. With one exception, the handful of reported California bankruptcy decisions treating the issue since the decision of the Supreme Court in *Allied* have failed to undertake the analysis which *Allied* compels.<sup>47</sup> Instead, most of the California Bankruptcy decisions have continued to follow the 1956 decision of the Ninth Circuit in *England v. Sanderson*.<sup>48</sup> Because *England v. Sanderson* did not anticipate the refined analysis announced in *Allied*, continued reliance upon it is misplaced.<sup>49</sup>

In the bankruptcy exemption context, only the Ninth Circuit opinion in *LaFortune v. Naval Weapons Center Federal Credit Union*<sup>50</sup> has applied the analysis required by *Allied*. In that case, the court considered whether the claimed residential exemption, effective as of July 1, 1975, as an alternative to the declared homestead, could be applied retroactively to affect the rights of a contract creditor who extended credit prior to that date. The court concluded that the claimed residential exemption was an entirely new exemption and thus substantially impaired the rights of pre-existing contract creditors.<sup>51</sup> The court also decided that no demonstrable necessity for the legislation existed and therefore the substantial impairment was not justified by a sufficient

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47. *Bassin v. Stopher*, 637 F.2d 668 (9th Cir. 1981); *Gill v. Halub*, 25 Bankr. 617 (Bankr. C.D. Cal. 1982); *In re McDaniel*, 13 Bankr. 628 (Bankr. S.D. Cal. 1981); *In re Skipwith*, 9 Bankr. 730 (Bankr. S.D. Cal. 1981); *In re Murillo*, 4 Bankr. 612 (Bankr. C.D. Cal. 1980); *In re Pappas*, 2 Bankr. 138 (Bankr. C.D. Cal. 1979) (Bankruptcy Act); *In re Bonant*, 1 Bankr. 335 (Bankr. C.D. Cal. 1979) (Bankruptcy Act). Several of these decisions rely on or cite to *Swenor v. Robertson*, 452 F. Supp. 673 (1978), decided before the *Allied* case.

48. 236 F.2d 641 (9th Cir. 1956).

49. The opinion in *England v. Sanderson* dealt primarily with the mechanism by which the trustee could assert the rights of creditors who extended credit prior to the increase in the amount of an exemption. The court assumed, through footnote references to California Appellate Court decisions rendered in the execution context, that changes in the amount of an exemption could not be applied retroactively to pre-existing contract creditors in the bankruptcy context. *Id.* at 642, n.2. Moreover, the California exemption at issue in the case did not even purport to make changes in exempt amounts retroactive, unlike Section 703.050 of the new law. Thus, the constitutional issue was not meaningfully explored.

50. 652 F.2d 842 (9th Cir. 1981).

51. *Id.* at 847. In this respect, the court's view coincided with *Daylin Medical and Surgical Supply, Inc. v. Thomas*, 69 Cal. App. 3d Supp. 37, 138 Cal. Rptr. 878 (Cal. App. Dep't Super. Ct. 1977) and differed from *San Diego White Truck Co. v. Swift*, 96 Cal.App.3d 88, 157 Cal. Rptr. 745 (1979). The court did not feel bound by the decision in *San Diego White Truck Co.* because the issue concerned interpretation and application of a clause of the United States Constitution. 652 F.2d at 846.

governmental interest.<sup>52</sup>

If the Contract Clause is relevant, the decisions in *Allied* and *LaFortune* should be the point of departure for consideration of the constitutionality of sections 703.050 and 703.060. Applied to these sections, the *Allied* and *LaFortune* decisions suggest that retroactive application of changes in exemption law to unsecured contract creditors may be constitutional in some cases and unconstitutional in others.

The first question to ask is whether the change in an exemption has *substantially* impaired the rights of any contract creditor whose claim is listed in the debtor's petition. This question is difficult to answer because the term "substantial" is relative. The exact comparisons that need to be made in the bankruptcy context to determine the substantiality of an impairment are unclear. To date, the comparison, when made, seems to have been between the amount of the new or increased exemption and the amount of the old exemption, without considering the impact of the change on a specific creditor.<sup>53</sup> The simplicity of this approach makes it appealing but, at least in the bankruptcy context, this approach sidesteps the central issue of whether the rights of a specific creditor have been substantially impaired.

A more meaningful comparison in the bankruptcy context would be between the dividend be paid to an unsecured creditor applying the pre-existing exemption scheme and the dividend that would be paid to that same creditor applying the new exemption scheme. To make this comparison, one must understand how a trustee can reach and how a trustee shall distribute property that is exempt as to some creditors, but not exempt as to other creditors because a new or increased exemption is not applied retroactively. That subject has an important history as well as an uncertain future.<sup>54</sup> In some bankruptcy cases in which im-

52. *LaFortune v. Naval Weapons Center Federal Credit Union*, 652 F.2d 842, 848 (9th Cir. 1981).

53. *Id.* (new exemption not retroactive); *Eldridge v. Commercial Credit Corp.*, 22 Bankr. 218 (Bankr. D. Me. 1982) (increase in automobile exemption from \$1,000 to \$2,000 retroactive); *Curry v. Associates Financial Services*, 5 Bankr. 282 (Bankr. N.D. Ohio 1980) (increase in household goods exemption from \$600 to \$1,500 retroactive); *In re Echavarren*, 2 Bankr. 215 (Bankr. D. Idaho 1980) (increase in homestead from \$10,000 to \$25,000 not retroactive).

54. In *Lockwood v. Exchange Bank*, 190 U.S. 294 (1902), the United States Supreme Court held that a creditor holding a promissory note in which the debtor waived the applicable homestead exemption could seek "a reasonable postponement of the discharge of a bankrupt, in order to allow the institution in the state court of such proceedings as might be necessary to make effective the rights possessed by the creditor." *Id.* at 300. That holding was premised upon the provisions of the Bankruptcy Act that exempt property never became property of the estate and hence that the bankruptcy court had no power to administer property which was exempt from the reach of the trustee. Upon the institution of such state court proceedings, the creditor could presumably satisfy as much of its claim as the equity in the debtor's homestead permitted. That solution is not as satisfactory where there are *several* creditors who claim an impairment of contract by a new or increased exemption. Relegating such creditors to state court proceedings would reward those quickest to act to the detriment or exclusion of others, a result at odds with a purpose of bankruptcy, to treat unsecured, non-priority creditors equally. Largely as a consequence, the

pairment of contract has been assumed, the courts have directed that the trustee is entitled to reach the amount of an increase in an exemption corresponding to the total of the claims held by impaired creditors. The trustee shall then distribute that amount, together with the remainder of the estate, in accordance with the distribution provisions of the Bankruptcy Code.<sup>55</sup> When the provisions of the Code are followed, the dividend received by an impaired, nonpriority, unsecured creditor will depend upon the amount of equity in the property that is reached by the trustee, the amount paid to any priority claims, and the total amount of other unsecured claims.

To illustrate, suppose the following hypothetical cases. In a petition filed in fall, 1983 an unmarried debtor claims the California exemptions to protect \$50,000 received in settlement of a personal injury claim. The debtor lists three contract creditors who extended credit prior to July 1, 1983, the effective date of a new exemption for a per-

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Ninth Circuit Court of Appeals permitted the bankruptcy trustee to reach the amount of an increase in an exemption and to include that amount in the estate for general distribution. England v. Sanderson, 236 F.2d 641 (9th Cir. 1956).

To circumvent the holding in *Lockwood*, the Ninth Circuit grounded the trustee's rights in section 70(c) of the Bankruptcy Act. Bankruptcy Act of 1898, Ch. 541, §70(c), 30 Stat. 565, as amended in 1950 and 1966 (repealed 1979). Whatever validity that analysis may have had under the Bankruptcy Act, it no longer suffices to give the trustee rights under the Bankruptcy Code. Section 544(a) of the Bankruptcy Code gives the trustee the rights of a creditor who, hypothetically, extends credit on the day of the filing of the petition and who, with respect to such credit, obtains a lien on the day of the filing of the petition, whether or not such a creditor actually exists. 11 U.S.C. §544(a) (Supp. V 1981). A trustee asserting the rights of such a hypothetical lien-creditor clearly cannot argue that contract rights have been impaired by a new or increased exemption which became effective prior to the date of the filing of the petition.

Section 544(b) of the Bankruptcy Code gives the trustee the rights of an actual creditor holding an allowable unsecured claim to "avoid any transfer of an interest of a debtor in property or any obligation incurred by the debtor that is voidable under applicable law." 11 U.S.C. §544(b) (Supp. V 1981). The creation of a new exemption, or the increase in the amount of an exemption, is neither an obligation incurred by the debtor nor a transfer by the debtor. See 11 U.S.C. §101(41) (Supp. V 1981) (definition of "transfer"). Accordingly, section 544(b) cannot subrogate the trustee to the rights of any creditor who claims an impairment of contract by virtue of a change in exemption law.

One court has, therefore, concluded that the trustee has no rights on behalf of creditors who claim an impairment to reach property claimed as exempt but that creditors may take appropriate action in the bankruptcy court to that end. *In re Skipwith*, 9 Bankr. 730 (Bankr. C.D. Cal. 1981). See also *In re McDaniel*, 133 Bankr. 628 (Bankr. S.D. Cal. 1981). Other courts have continued to allow the trustee to reach some property claimed as exempt relying erroneously on some pre-Code cases. *Gill v. Halub*, 25 Bankr. 617 (Bankr. C.D. Cal. 1982); *In re Murillo*, 4 Bankr. 612 (Bankr. C.D. Cal. 1980).

It would seem simpler and more appropriate to ground the trustee's rights in the trustee's powers to collect and administer the estate upon concluding that an exemption not effective against all creditors cannot fully remove property from the estate. Because section 541 of the Bankruptcy Code, unlike the Bankruptcy Act, initially includes all legal and equitable interests of the debtor, including exempt property, in the estate (with exceptions not relevant here). 11 U.S.C. §541 (Supp. V 1981). *Lockwood v. Exchange Bank* is not a bar to that conclusion.

55. Compare *Swenor v. Robertson*, 452 F.Supp. 673 (N.D. Cal. 1978) (amount of homestead exemption is amended amount, \$30,000, less total of claims of impaired creditors, but in no event less than previous amount of homestead exemption, \$20,000), with *In re Pappas*, 2 Bankr. 138 (Bankr. C.D. Cal. 1980) (amount of homestead exemption is amount in effect prior to increase, \$20,000, plus any amount of the increase in the exemption, \$10,000, which remains after allocating additional equity to the trustee corresponding to the total of the claims of impaired creditors).



sonal injury settlement.<sup>56</sup> The debtor can sustain the burden of showing that all of the settlement proceeds are reasonably necessary for his support, a requirement for claim of the exemption. Each of the three creditors is unsecured and without priority. Creditor A claims \$2,000. Creditor B claims \$5,000. Creditor C claims \$15,000. The total of all unsecured claims scheduled is \$125,000. There are no priority claims, other than administrative expenses. All property of the debtor other than the proceeds from the settlement are exempt without question. If the exemption were not applied retroactively and the \$22,000 of the proceeds of the settlement (the total of the claims of Creditors A, B and C) were distributed ratably among all unsecured claims, each would receive something less than 18 cents on the dollar (\$352 for Creditor A, \$880 for Creditor B and \$2,640 for Creditor C).<sup>57</sup>

Suppose, instead, that the same debtor were seeking to exempt \$30,000 equity in a home rather than the proceeds of a personal injury settlement. Each of the three creditors extended credit prior to the effective date of the amendment to the Civil Code that increased the amount of the homestead exemption from \$25,000 to \$30,000 for persons not the head of a household and not over the age of 65.<sup>58</sup> All property of the debtor, other than his home, is exempt without question. In this case, each creditor would receive something less than 4 cents on the dollar if the \$5,000 increase in the exemption were not applied retroactively (\$80 for Creditor A, \$200 for Creditor B and \$600 for Creditor C). The question then would be whether a difference between 18 cents on the dollar and no dividend in the first illustration, or between 4 cents on the dollar and no dividend in the second illustration would constitute a substantial impairment of the claim of each creditor. Views may differ on the answer to that question, but it seems appropriate to ask if the Contract Clause is relevant in the bankruptcy context and if distribution is to be made in the manner suggested.<sup>59</sup>

This comparison between two postulated amounts of dividends is

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56. The exemption is for causes of action, an award of damages, or a settlement arising out of personal injury. An award of damages or settlement is exempt to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor except as against a provider of health care whose claim is based on the providing of health care for the personal injury for which the award or settlement was made. CAL. CIV. PROC. CODE §704.140.

57. I assume that administrative expenses reduce the dividend somewhat.

58. CAL. CIV. CODE §1260, (*repealed by* Enforcement of Judgments Law, 1982 Cal. Legis. Serv. Chap. 1364 (West), and *superseded by* CAL. CIV. PROC. CODE §704.730).

59. The notion that distribution should be made to all unsecured creditors even though only the claims of a few unsecured creditors are impaired appears to spring from part of the holding in *Moore v. Bay*, 284 U.S. 4 (1931). See *England v. Sanderson*, 236 F.2d 641, 644 (1956). The conclusion does not inevitably follow from *Moore v. Bay* because that case involved the avoidance of a fraudulent transfer. If distribution were made only to those creditors whose claims are impaired, the impairment will always be more substantial.

somewhat complex.<sup>60</sup> Accordingly, courts may be inclined to continue to focus only upon the amount of increase in the exemption to determine whether an impairment of a contract creditor's claim is substantial.<sup>61</sup> Either approach to the issue of substantial impairment breeds enormous uncertainty for those seeking to predict relevant outcomes for clients. Further uncertainty arises from the principle that even substantial impairments may survive constitutional scrutiny when justified by sufficient countervailing interests.<sup>62</sup> Yet this is the path we seem destined to travel if the courts persist in considering the Contract Clause relevant in the bankruptcy exemption context. Surely, this is not a path that the drafters of the Contract Clause or the drafters of the Bankruptcy Code would have us travel had they foreseen the journey. The more sensible conclusion is that the Contract Clause does not hinder the choice of exemptions in bankruptcy, even when that choice is made by applying a statute that may impair the obligation of contract in the context of enforcement of a judgment.

### CONCLUSION

The tension between federal and state power that is implicit in the Federal Constitution and affected much of the drafting of the new Bankruptcy Code is surfacing once again in California in 1983. The language of section 522(b) of the Bankruptcy Code which apportioned that power was shaped by last minute, hurried compromise, and thus, was bound to leave the tension somewhat unresolved. This article suggests a resolution of that tension in three areas of significant concern to consumer debtors and their creditors.

The stacking of exemptions by spouses should not be permitted be-

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60. Imagine the difficulties of calculation if elements of the two illustrations in the text were present in one case.

61. See *supra* note 53 and accompanying text.

62. Language in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), for example, leaves open to question whether retroactive application of increases in the amounts of exemptions, even if substantially impairing contract rights, is nonetheless constitutional because the increase protects debtors against the erosion of the value of their property by inflation or because it serves some other important value. At one point the court speaks of justification for even substantial impairment if the impairment is necessary "to meet an important general social problem." *Id.* at 247. Elsewhere the opinion refers to justification for substantial impairment based on broad and desperate economic conditions. *Id.* at 249. The opinion then hastens to add that "[t]his is not to suggest that only an emergency of great magnitude can constitutionally justify a state law impairing the obligations of contracts." *Id.* at 249, n.24. Elsewhere the opinion hints that substantial impairment may be justified only where the impairment is "a temporary alteration of the contractual relationships of those within its coverage." *Id.* at 250. In a case decided in its previous term, *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977), the court said that "an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose." *Id.* at 25. That language was echoed in the Ninth Circuit's opinion in *LaFortune v. Naval Weapons Center Federal Credit Union*, 652 F.2d 842, 847-48 (1981). Drafting of section 703.060 of the Code of Civil Procedure, quoted in note 34 *supra*, was probably inspired by the dicta in these and other cases.

cause it abuses the spirit of both the federal bankruptcy exemption scheme and the California exemption scheme. The prohibition of exemption stacking must come, however, by amendment to section 522(m) of the Bankruptcy Code and not through the circuitous route mapped in section 703.130 of the new California enforcement of judgments law. A California opt out of the federal bankruptcy exemptions ought to come, if at all, through legislation that is clearly identified for that specific purpose. This legislation should squarely address the problem of discrimination between homeowners and nonhomeowners that is implicit in the California exemption law. Opt out should not come silently and unobtrusively through the back door of section 703.130. Finally, courts should rid themselves of the nuisance and uncertainty generated by the unnecessary application of the Contract Clause to the question of the amount of exemptions available to debtors seeking relief under the federal bankruptcy law. Retroactive application of changes in exemption law to creditors of these debtors will scarcely cause a ripple in consumer credit markets and will do no violence to entrenched constitutional principles.